(2)

No. 88-23

IN THE

Supreme Court of the United States

October Term, 1988

LAURO LINES s.r.l.,

Petitioner,

v.

SOPHIE CHASSER, ANNA SCHNEIDER, ILSA KLINGHOFFER and LISA KLINGHOFFER, as Co-Executrixes of the Estate of LEON and MARILYN KLINGHOFFER, VIOLA MESKIN, SEYMOUR MESKIN, SYLVIA SHERMAN, PAUL WELTMAN, EVELYN WELTMAN, DONALD E. SAIRE and ANNA G. SAIRE, CHANDRIS CRUISE LINES, ABC TOURS TRAVEL CLUB, CHANDRIS (ITALY) INC., PORT OF GENOA, ITALY, CLUB ABC TOURS, INC., and CROWN TRAVEL SERVICE, INC., d/b/a RONA TRAVEL and /or CLUB ABC TOURS, and CLUB ABC TOURS, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Is an order of a United States District Court denying enforcement of a foreign forum selection clause appealable as a collateral final order?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES AND RULES CITED

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RESPONDENTS BRIEF IN OPPOSITION

Respondents Ilsa Klinghoffer and Lisa Klinghoffer respectfully request that this Court deny the petition for writ of certiorari, seeking review of the opinion of the Court of Appeals for the Second Circuit in this case. That opinion is reported at 844 F.2d 50.

OPINIONS BELOW

The opinion of the United States Court Appeals for the Second Circuit officially reported at 844 F.2d 50 (2d Cir. 1988) is printed in the Appendix at 1a-12a. the decision of the United States District Court for the Southern District of New York dictated in open Court on October 21, 1987, not officially reported, is printed in the Appendix at 13a-17a.

STATEMENT OF THE CASE

Petitioner Lauro Lines s.r.l. ("Lauro Lines") is the successor by merger to Achille Lauro de Altri-Gestione m/n "Achille Lauro" s.n.c. ("ALA") and Societa de Fatto Achille Lauro ed Altri-Gestione Armatoriali Nava Noleggiate ("FAL"), partnerships whose offices were located at Via C. Columbo 45, Naples, Italy. ALA owned the Italian-flag ACHILLE LAURO. Since February, 1982 both partnerships were in Italian reorganization proceedings. On July 28, 1986 all members of the Lauro group, including these partnerships, were merged into one company, *i.e.*, Lauro Lines s.r.l. The merger was deemed retroactive to February, 1982.

On Septmber 14, 1984 ALA time chartered the ACHILLE LAURO to a joint venture composed of FAL and Chandris S.A. (Piraeus). The Joint Venture operated the Vessel as a cruise ship. Tickets were sold to passengers worldwide. Chandris S.A. (Piraeus) was reponsible for the United States market. It retained Chandris, Inc. in New York to promote bookings and distribute tickets to interested travel agents, and others.

In October, 1985 the ACHILLE LAURO was hijacked by terrorists while on a cruise in the Mediterranean. The cruise commenced at Genoa, Italy, and it was scheduled to terminate at that port. The ticket held by each passenger contained 32 provisions. Among them was the following:

> Art. 31—VENUE OF JUDICIAL PROCEEDINGS—All controversies that may arise directly or indirectly in connection with or in relation to this passage contract, must be instituted before the judicial authority in Naples, the jurisdiction of any other authority being expressly renounced and waived . . .

Beginning in November, 1985 certain American passengers (and the representative of a deceased passenger) brought a series of suits in the United States District Court for the Southern District of New York against Lauro Lines, Chandris, and Crown Travel Service, Inc. ("Crown"). Jurisdiction was based upon diversity of citizenship, 28 U.S.C.A.§ 1332, and, the actions are also within the District Court's admiralty jurisdiction. 28 U.S.C.A. § 1333.*

On November 17, 1986 Lauro Lines filed a motion for an order dismissing all actions against it on the grounds of lack of New York *in personam* jurisdiction, the ticket forum selection clause, and *forum non conveniens*. Defendants Chandris and Crown joined the motion to dismiss on the basis of the forum clause. Plaintiffs in all actions opposed the motion.

On October 21, 1987 following oral argument, the District Court denied Lauro Line's motion. With respect to the forum selection clause, the District Court stated, in part:

> I find that the ticket does not give fair warning to the American citizen passenger that he or she is renouncing and waiving his or her opportunity to sue in a domestic forum over a contract made and delivered in the United States.

App. 16a.

* The Chasser action (85 Civ. 9708) (diversity of citizenship); the Klinghoffer action (85 Civ. 9303) (diversity of citizenship and the Death on the High Seas Act, 28 U.S.C. 761 *et* seq.); the Saire action (86 Civ. 6332) diversity of citizenship); the Meskin action (86 Civ. 4657) (no jurisdiction allegation in the Complaint).

On October 23, 1987 the Order denying enforcement of the forum clause was entered by the District Court.

On November 20, 1987 Lauro Lines filed its Notice of Appeal from that portion of the Order denying enforcement of the foreign forum selection clause. Appellate jurisdiction was invoked under the collateral final order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) *cert. granted*, 336 U.S. 917 (1949). Chandris and Crown filed similar Notices of Appeal. All cases were consolidated for purposes of the appeal.

On January 29, 1988 plaintiffs filed a motion to dismiss the appeal for want of appellate jurisdiction.

On April 7, 1988 the United States Court of Appeals for the Second Circuit granted the motion for an order dismissing the appeal for lack of appellate jurisdiction. The Second Circuit concluded that:

> The order at issue here is not appealable under the collateral order doctrine, *Chasser v. Achille Lauro Lines*, 844 F.2d 50, 56 (2d Cir. 1988).

REASONS WHY THE WRIT SHOULD BE DENIED

THE INSTANT CASE IS NOT THE PROPER CASE TO DECIDE THE QUESTION PRESENTED

Petitioner relies on Rule 17:1(a) of the Supreme Court Rules stating that one of the character reasons considered by the Court in determining whether to exercise it discretion to review by writ of certiorari is:

> When a Federal Court of Appeals has rendered a decision in conflict with the decision of another federal court of appeal on the same matter . . . .

The key words are 'same matter'. In the instant case, the contract is one of adhesion, not normally reviewable by the consumer. This matter does in fact differ from the decisions

in the other Circuits and as such is not in conflict. The Courts recognize that the various sophistication levels of the contracting parties and the likelihood to review a forum selection clause present 'different matters' for judicial decision.

Four Courts of Appeals, exclusive of the Court below, have considered the question whether an order denying enforcement of a forum selection clause is appealable as a collaterally final order. A common thread running through the facts of each case has been that the contract examined was of a type which is ordinarily subject to extensive review.[1]

The current facts indicate that the plaintiffs were not adequately directed to the terms inside the ticket by defendant. Whether a notice on the face of a ticket is sufficient to "draw the passengers attention to the conditions" within, and thereby incorporate those conditions into the ticket/contract, depends upon the particular circumstance of each case and the ticket involved. It is not uncommon for a Court in the process of scrutinizing a ticket (in order to determine a defendant carrier's motion to dismiss) to engage in consideration of such minutia as the shape of the ticket, how it is bound, the number of pages, the placement of each phrase, the size of the type utilized, the number of columns of print, the languages used and the color of paper and ink employed. *McQuillan v. Italia Societa Per Azione Di Navigazione*, 386 F. Supp. 462 (S.D. N.Y. 1974), *aff'd*, 516 F.2d 896 (2d Cir. 1975).

[1] *Coastal Steel Corp. v. Tilghman.*, 709 F.2d 190 (3rd Cir. 1983), *cert. denied*, 464 U.S. 938 (1983) involving a commercial building contract; *Farmland Industries v. Frazier-Parrot Commodities*, 806 F.2d 848 (8th Cir. 1986) involving a commercial commodities contract; *Louisiana Ice Cream Distributors v. Carvel Corp.*, 821 F.2d 1031 (5th Cir. 1987) involving sales, distribution, retail and license agreements; *Rohrer, Hibler & Replogle, Inc. v. Perkins*, 728 F.2d 860 (7th Cir. 1984), *cert. denied*, 469 U.S. 890 (1984) involving an employment contract.

The Achille ticket has but one reference on the outside of the ticket directing passengers to read the terms, including Art. 31, within. It is far from certain that the Achille Lauro ticket "reasonably communicates the importance"[2] of a term in conditions of passage, a term which would require a passenger to return to Europe to have their day in Court.

Public policy argues against contracts of adhesion which lay venue outside the United States. In *Bremen v. Zapata Off-Shore Company* 407 U.S. 1 (1972)[3] the Court stated that forum selection clauses are "*prima facie* valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." *Id.* at 10.

The *Zapata* holding that forum selection clauses are *prima facie* valid can be distingushed on the facts in the same manner the four decisions of the other Courts of Appeals can be distinguished from that of the Court below. Critical to the Court's holding in *Zapata* is that:

> The choice of (the London) forum was made in an arms-length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reason it should be honored by the parties and enforced by the courts." *Id.* at 12.

Under the facts of *Central Contracting Co. v. Maryland Casualty Co.*, 367 F.2d 341, 344 (3d Cir. 1966) cited by the *Zapata* Court to define reasonableness, "mere inconvenience

[2] *McQuillan*, at 466.

[3] *Zapata* involved a contract between an ocean-towing tug service based in Europe and an American offshore drilling concern. The Bremen was to tow a large, barge mounted, drilling rig from the Gulf of Mexico to the North Sea. In route the rig was damaged and the Bremen put into port at Florida. The contracts to tow placed venue for any litigation in London. Zapata attempted to litigate in the U.S. Evertually the Supreme Court gave the forum selection clause effect.

or additional expenses" were found insufficient to constitute a test of unreasonableness in a forum selection clause. This is logical in the context of a commercial contract "since it may be assumed that the plaintiff *(i.e.*, the party resisting the forum provision) received under the contract, consideration" for any such expense or inconvenience. *Id.* at 344-45. There is room to argue that an unsophisticated tourist should not be held to the same standard of reasonableness. *Cf. L.F.C. Lessors Inc. v. Pearson*, 585 F. Supp. 1362 1364 (D.Mass. 1984).[4]

The Achille plaintiffs were not dealing with the defendants at arms length and surely, if confronted directly with the forum selection clause at Art. 31, would have hesitated to accept the contract.

The court in *Davenport v. Adolph*, 314 N.W. 2d 432, (Iowa 1982), 31 A.L.R. 4th 395, 403, surveyed the attitude of different jurisdiction's choice-of-forum provisions and reported that such provisions "are less likely to be sustained if they appear in adhesion contracts prepared in advance by one of the parties and will generally be disregarded if genuine inconvenience or inadequacy of remedy would ensue from them.[5]

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[4] In *L.F.C.* the defendant opposed a forum selection provision. The court upheld the provision after finding that the defendant was not an "unsophisticated consumer" but a businessmen.

[5] Cruise tickets are without question adhesion contracts. "The ticket is what has been called a contract of 'adhesion' or a 'take or leave it' contract. In such a standardized or mass production agreement with one sided control of its terms, when the one party has no real bargaining power, the usual contract rule, based on the idea of 'freedom of contract' cannot be applied rationally. For such a contract is 'sold not bought'. The one party dictates its provisions, the other has no more choice in fixing those terms than he has about the weather . . . . "*Seigelman v. Cunard White Star*, 221 F.2d 189, 204 (2d Cir. 1955).

In contrast is New York Southern District's clear position that "Courts in this District have consistently found that it is not unreasonable to enforce a choice of forum provision embodied within a standard printed form." *Dukane Fabrics International, Inc.v. M.V. Hreljin*, 600 F. Supp. 202, 203 (S.D.N.Y. 1985). The District Court cites two cases in support of this proposition.[6] All three cases are commercial in nature-contracts, which involve sophisticated parties and which would ordinarily be subject to extensive review. None involve passenger contracts for a cruise ship.

The question posed by Petitioner is very broad. Whether a given forum selection clause is appealable must rest on the facts and circumstances of each case. Should this Court feel that the Circuits which have decided the issue, none of which have addressed adhesion contracts and unsophisticated parties thereto, are in conflict, then a case similar to those decided by the conflicting Circuits should be used to finally decide the issue. This case is not suitable for the question.

THE APPELLATE PROCESS IS PROCEDURAL IN NATURE THUS ENABLING EACH CIRCUIT TO ESTABLISH ITS PROCEDURAL PRACTICE.

An appeal from the judgment of a Federal District Court is a matter of right.[7] However, the Court of Appeals must grant

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[6] *Galaxy Export Cor. v. M/V "Hektor"*, 1983 A.M.C 2637 (S.D.N.Y 1983); *Patterson, Zochonis (U.K.) Ltd. v. Compania United Arrows S.A.*, 493 F. Supp. 626 (S.D.N.Y. 1980).

[7] *Bray v. U.S.*, 370 F.2d 44, 46 (5th Cir. 1966). See, also, *Brewen v. U.S.*, 375 F.2d 285, 286 (5th Cir. 1967); *Fennell v. U.S.*, 339 F.2d 920, 922 (10th Cir. 1965), *cert. denied* 86 S. Ct. 100, 382 U.S. 852, 15 L.Ed.2d 90.

permission for a litigant to appeal to that Court. The granting of permission may at times occur in an informal fashion[8] but ordinarily is accomplished by explicit order. If no application is made to it within the time specified by statute, no appeal can be taken.[9] The statutory criteria of 28 U.S.C. § 1292 'Interlocutory Decisions' do not literally apply to the Court of Appeals, which is simply authorized to permit appeals in its discretion.[10] Permission to appeal is granted sparingly not automatically. *Alabama Labor Council v. State of Alabama;* 453 F.2d 922, 924 (5th Cir. 1972). The Senate report[11] compared this to that of the Supreme Court in controlling its certiorari jurisdiction and noted that jurisdiction might be denied without specifying reasons[12] and for such reasons as the number of cases on the docket deserving priority. The statu tory criteria, however, are useful guides to the Courts of

[8] *In Lairsey v. Advance Abrasives Co.*, 542 F.2d 928, 929 note 2, (5th Cir. 1976) the plaintiffs sought relief from the judgment under Civil Rule 60(b) while an appeal was pending. After denial of relief, the plaintiffs requested leave for an interlocutory appeal, apparently relying on §1292(b). "This court carried with the merits appeal the motion for leave to appeal from the Rule 60 denial."

[9] Failure to file an application with the Court of Appeals within the ten day time limit provided by §1292(b) "is jurisdictional defect."

[10] "Permission to allow interlocutory appeals should . . . . be granted sparingly and with discrimination." *Control Data Corp. v. International Business Mach. Corp.*, 421 F.2d 323, 325 (8th Cir. 1970). "We agree with those courts that have held that the procedure authorized in subsection (b) should be used sparingly and with discrimination." *Lear Siegler, Inc. v. Adkins*, 330 F.2d 595, 598 (9th Cir. 1964).

[11] S.Rep. 2434, 85th Cong., 2d Sess., 1958, in 1958 U.S. Code Cong. & Admin. News 5255, 5257.

[12] "Although it is not incumbent upon this court to express our reasons for granting or denying an application for permission to take an interlocutory appeal, we do so in the present case." *Kraus v. Board of County Road Comm'rs*, 364 F.2d 919, 922 (6th Cir. 1966).

Appeals.[13] The implication of the appellate process is certainly that it is one of procedure.

Although Petitioner bases his appeal on the collateral final order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) rather than on the strict interpretation of 28 U.S.C. § 1292, the appellate process as explained remains the same.

The Court of Appeals for each Circuit may establish its own appellate procedure. The United States Code provides in part that:

> The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with the Acts of Congress and rules of practice and procedure prescribed by the Supreme Court. 28 U.S. C.A. §2071.

A court may promulgate rules and interpret them as adjuncts to dispensation of justice and orderly and expedient administration of its functions, with the limitation that substantial rights of litigants be not unduly circumscribed. *S. Stern & Co. v. U.S.*, 331 F. 2d 310, (C.C.P.A. 1963), *cert. denied*, 84 S. Ct. 1169.

The question becomes whether the substantial rights of litigants in the instant case have been unduly circumscribed. The order below points to t ere being no reason why denial of a motion to dismiss on the basis of a contractual forum

[13] "Although the statute does not expressly lay down standards to guide the Court of Appeals in its exercise of judicial 'discretion', it would seem that the appellate court should at least concur with the district court in the opinion that the proposed appeal presents a difficult central question of law which is not settled by controlling authority, and that a prompt decision by the appellate court at this advanced stage would serve the cause of justice by accelerating 'the ultimate termination of the litigation.' "*In Re Heddendorf*, 263 F.2d 887, 889 (1st Cir. 1959).

selection clause should be any less subject to correction upon appeal from a final judgment then are denials of motions for dismissal on grounds of improper venue or of forum-non-conveniens. *Chasser*, 844 F.2d at 54. The Supreme Court has made it clear that the mere fact that ultimately it might appear that an interim reversal would have been more efficient, or that the party against whom the order is entered may have difficulty in persuading the Appellate Court to reverse after a final judgment, is not reason to grant immediate review. *Stringfellow v. Concerned Neighbors In Action*, 107 S. Ct. 1177 (1987). The Court succinctly stated in *Richardson—Merrell Inc. v. Koller*, 472 U.S. 424, 436 (1985):

> "The possibility that a ruling may be erroneous and may impose additional litigation expense is not sufficient to set aside the finality requirement imposed by Congress."

As is evident from these decisions, the consequences which would accompany the denial of enforcement of a forum selection clause are not considered as unduly circumscribing the rights of litigants thereby prohibiting the courts from prescribing their individual appellate rules on the matter.

Without restating the cases on which Petitioner relies to indicate conflict between the Circuits, should this Court in fact determine that there is such a conflict, this conflict is permissible pursuant to the rule making power afforded the various Federal Courts under 28 U.S.C.A. §2071.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully Submitted
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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 1987

(Argued: February 16, 1988 Decided: April 7, 1988)
Docket Nos. 87-9081, -9083, -9085, -9087, -9089, -9091

SOPHIE CHASSER, ANNA SCHNEIDER, ILSA KLINGHOFFER and LISA KLINGHOFFER, as Co-Executrixes of the Estate of LEON and MARILYN KLINGHOFFER, VIOLA MESKIN, SEYMOUR MESKIN, SYLVIA SHERMAN, PAUL WELTMAN, EVELYN WELTMAN, DONALD E. SAIRE and ANNA G. SAIRE,

Plaintiffs-Appellees,

— v. —

ACHILLE LAURO LINES, THE LAURO LINES s.r.l., FLOTTO ACHILLE, CHANDRIS CRUISE LINES, ABC TOURS TRAVEL CLUB, S.N.C. ACHILLE LAURO ED ALTRI-GESTIONE MOTONAVE ACHILLE LAURO IN AMMINISTRAZIONE STRAORDINARIA, COMMISSARIO OF THE FLOTA ACHILLE LAURO IN AMMINISTRAZIONE STRAORDINARIA, CHANDRIS (ITALY) INC., PORT OF GENOA, ITALY, CLUB ABC TOURS, INC., and CROWN TRAVEL SERVICE, INC., d/b/a RONA TRAVEL and /or CLUB ABC TOURS,

Defendants,

LAURO LINES s.r.l., CHANDRIS CRUISE LINES, CLUB ABC TOURS, INC., CROWN TRAVEL SERVICE, INC., d/b/a/ RONA TRAVEL and/or CLUB ABC TOURS, and CLUB ABC TOURS, INC.,

Defendants-Appellants.

Before:

KEARSE and MAHONEY, *Circuit Judges,*
and GLASSER, *District Judge**

Motion to dismiss appeals from an interlocutory order of the United States District Court for the Southern District of New York, Louis L. Stanton, *Judge*, denying motion of defendant Lauro Lines s.r.l. to dismiss actions on ground that contract provision required suit to be brought in Italy.

Motion granted.

MORRIS J. EISEN, P.C., New York, New York (Arthur M. Luxemberg, New York, New York), *for Plaintiffs-Appellees Sophie Chasser, Anna Schneider, Viola Meskin, Seymour Meskin, Sylvia Sherman, Paul Weltman, and Evelyn Weltman.*

WOLF, BLOCK, SCHORR & SOLIS-COHEN, Philadelphia, Pennsylvania, (Fischer, Kagan, Ascione & Zaretsky, New York, New York), *for the Klinghoffer Plaintiffs-Appellees.*

WILLIAM P. LARSEN, JR., New York, New York, (Newman, Schlau, Fitch & Burns, P.C., New York, New York), *for the*

* Judge of the United States District Court for the Eastern District of New York, sitting by designation.

Saire Plaintiffs-Appellees.

RAYMOND A. CONNELL, New York, New York, (Healy & Baillie, New York, New York), *for Defendant-Appellant Lauro Lines s.r.l.*

KIRLIN, CAMPBELL & KEATING, New York, New York (Daniel J. Dougherty, New York, New York), *for Defendant-Appellant Chandris Cruise Lines.*

RUBIN, HAY & GOULD, P.C., Framingham, Massachusetts (Rodney E. Gould, Framingham, Massachusetts, A. George Koevary, Parker & Duryee, New York, New York), *for Defendant-Appellant Crown Travel Service, Inc., d/b/a Rona Travel and/or Club ABC Tours.*

KEARSE, *Circuit Judge:*

Defendants Lauro Lines s.r.l. ("Lauro"), *et al.*, appeal from an interlocutory order of the United States District Court for the Southern District of New York, Louis L. Stanton, *Judge*, denying Lauro's motion to dismiss the present actions on the basis of forum-selection clauses in the ticket agreements between Lauro, owner of the cruise ship ACHILLE LAURO, and plaintiffs, who were or represent passengers on the ACHILLE LAURO. The clauses provided that any suit by passengers against Lauro was to be brought in Naples, Italy. Plaintiffs have moved to dismiss the appeals for lack of appellate jurisdiction. For the reasons below, we grant the motion.

BACKGROUND

Plaintiffs, citizens and residents of the United States, were passengers, or are the executrixes of the estates of persons who were passengers, aboard the ACHILLE LAURO on a

Mediterranean cruise in October 1985 when it was hijacked by terrorists of the Palestine Liberation Organization ("PLO"). The passengers were held captive and terrorized by the PLO, and they have brought the present actions, informally consolidated below, to recover damages for physical and psychological injuries and for the wrongful death of Leon Klinghoffer.

Lauro moved to dismiss the actions on several grounds, including the ground that a forum-selection clause in each passenger ticket required plaintiffs to bring these suits in Naples. The district court denied the motion to dismiss. With respect to the forum-selection clause, the court stated that the touchstone for enforceability was "whether the ticket reasonably communicates the importance of its contract provision." Transcript dated October 21, 1987 ("Tr."), at 3. The court described the "cover reference" to the forum clause as "unobtrusive" and noted that the clause itself appeared in "tiny type." *Id.* at 4. Further, the court noted that though the ticket provided that the passenger " 'specifically approves' " certain clauses, the forum-selection clause was not among them. *Id.* at 5. In addition, though there was a place for the passenger's signature at the bottom of the contract, apparently none of the tickets was signed. In sum, while the district court termed the question of adequacy of notice a close one as to which reasonable persons might differ, *id.* at 4, it concluded that "as a whole . . . the ticket does not give fair warning to the American citizen passenger that he or she is renouncing and waiving his or her opportunity to sue in a domestic forum over a contract made and delivered in the United States," *id.* at 5. Accordingly, the court denied the motion to dismiss.

Lauro and two other defendants have appealed the court's refusal to dismiss on the basis of the forum-selection clause. Plaintiffs have moved to dismiss the appeals on the ground that the denial of the motion for dismissal is an interlocutory order that is not appealable under 28 U.S.C.§ 1291 (1982). Lauro, which made no effort to have the court's denial on

forum-selection grounds certified for immediate appeal pursuant to 28 U.S.C. § 1292(b) (1982), argues that that denial is a final order insofar as it determines where the litigation will be conducted and that it is immediately appealable under § 1291 pursuant to the *Cohen* doctrine, *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). We conclude that the order is not appealable and we therefore dismiss the appeals.

DISCUSSION

Section 1291 gives the courts of appeals jurisdiction to review "final decisions" of the district courts. 28 U.S.C. § 1291. The district court's denial of a motion to dismiss, which leaves the controversy pending, is not, technically, a final decision within the meaning of this section. *See, e.g. Catlin v. United States*, 324 U.S. 229, 236 (1945). The *Cohen* doctrine, on which Lauro here relies, is a judicially created exception that allows an immediate appeal from certain orders that are collateral to the merits of the litigation and that cannot be reviewed adequately after final judgment. As the Supreme Court has described it,

> [t]he collateral order doctrine is a "narrow exception," . . . whose reach is limited to trial court orders affecting rights that will be irretrievably lost in the absence of an immediate appeal. *See Helstoski v. Meanor*, 442 U.S. 500, 506–508 (1979); *Abney v. United States*, 431 U.S. 651, 660–662 (1977). To fall within the exception, an order must at a minimum satisfy three conditions: It must "conclusively determine the disputed question," "resolve an important issue completely separate from the merits of the action," and "be effectively unreviewable on appeal from a final judgment."

Richardson-Merrell Inc. v. Koller, 472 U.S. 424, 430–31 (1985) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)).

The narrowness of the collateral order doctrine reflects judicial deference to Congress's preference against piecemeal appeals, as well as the recognition that judicial efficiency may

be promoted by the denial of interim review because some interlocutory orders will have become moot by the time a final judgment is entered, either because the order is modified prior to final judgment, or because the party disadvantaged by the interlocutory order prevails in the action, or for some other reason. *See, e.g., Stringfellow v. Concerned Neighbors In Action, 107 S. Ct. 1177, 1184 (1987) ("Stringfellow"); Mitchell v. Forsyth,* 472 U.S. 511, 544 (1985) (Brennan, *J.*, concurring in part and dissenting in part). The Court has made it clear that when an interlocutory order will be reviewable on appeal from a final judgment, the mere fact that ultimately it might appear that an interim reversal would have been more efficient, or that the party against whom the order is entered may have difficulty in persuading the appellate court to reverse after a final judgment, is not a reason to grant immediate review. In *Stringfellow,* for example, a party that had been allowed to intervene in an action on condition, *inter alia,* that it not assert new claims sought to appeal immediately from the imposition of conditions on its intervention. Though it conceded that it would have the right to a review of the conditions upon appeal from the final judgment, it argued that the practicalities of complex and protracted litigation would make an appellate court reluctant to vacate the judgment on the basis of an erroneous intervention order. The Court was unpersuaded that this consideration should lead to disregard of the *Cohen* requirement of effective unreviewability on appeal from final judgment. As the Court succinctly stated in *Richardson-Merrell Inc. v. Koller,* "the possibility that a ruling may be erroneous and may impose additional litigation expense is not sufficient to set aside the finality requirement imposed by Congress." 472 U.S. at 436.

This Court too has generally been reluctant to apply the *Cohen* doctrine in an expansive fashion, "lest this exception swallow the salutory 'final judgment' rule." *Weight Watchers v. Weight Watchers Int'l, Inc.,* 455 F.2d 770, 773 (2d Cir. 1972); *see, e.g. Richardson Greenshields Securities, Inc. v. Lau,* 825 F. 2d 647, 651 (2d Cir. 1987); *Carlenstolpe v. Merck & Co.,* 819 F 2d 33, 35–36 (2d Cir. 1987); *United States Tour*

Operators Ass'n v. Trans World Airlines, 556 F. 2d 126, 128 (2d Cir. 1977). For example, our decisions indicate that this doctrine does not permit immediate appeals pursuant to § 1291 from orders denying motions to dismiss on grounds of improper venue, *see A. Olinick & Sons v. Dempster Bros., Inc., 365 F.2d 439, 442-44 (2d Cir. 1966), or forum non conveniens, see Carlenstolpe v. Merck & Co., 819 F.2d at 35-36.*

We have not previously considered the applicability of the *Cohen* doctrine to the denial of a motion to dismiss on the basis of a contractual forum-selection clause. Some of our sister circuits have concluded that such a denial is immediately appealable, *see Farmland Industries v. Frazier-Parrott Commodities,* 806 F.2d 848, 850-51 (8th Cir. 1986); *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.,* 709 F.2d 190, 193-97 (3d. Cir.) (*"Coastal Steel"*), *cert. denied,* 464 U.S. 938 (1983), while others have concluded that is not, *see Louisiana Ice Cream Distributors v. Carvel Corp.,* 821 F.2d 1031, 1032-34 (5th Cir. 1987); *Rohrer, Hibler & Replogle, Inc. v. Perkins,* 728 F.2d 860, 862 (7th Cir.), *cert. denied,* 469 U.S. 890 (1984). We are persuaded that the latter view is correct because we believe the refusal to dismiss on forum-selection grounds is not "effectively unreviewable on appeal from a final judgment."

The Third Circuit in *Coastal Steel* came to the conclusion that the district court's refusal to enforce a contractual forum-selection clause was unreviewable on appeal from a final judgment because 28 U.S.C. § 2105 (1982) provides that "[t]here shall be no reversal in the Supreme Court or a court of appeals for error in ruling upon matters in abatement which do not involve jurisdiction." We do not agree that § 2105 makes a refusal to enforce a forum-selection clause unreviewable after final judgment or, if it did have that effect, that it would allow such a refusal to be reviewed at an earlier state.

If § 2105 were to be taken literally and did preclude review of such denials after final judgment, we would be at a loss to understand how there could properly be interim review any

more than review after final judgment, for "no reversal" has a rather categorical flavor. *Coastal Steel's* rationale was that § 2105 could not have been intended to preclude interim review pursuant to the collateral order doctrine because that doctrine had not been devised in 1789 when the first progenitor of § 2105 was adopted. *See* 709 F.2d at 196. We find this rationale unpersuasive for two reasons. First, if Congress has indeed made a certain type of order immune from review, the courts simply are not free to ignore the congressional limitation. *See, e.g., Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 343 (1976) (order remanding removed action to state court on grounds provided in 28 U.S.C. § 1447(c)(1982) is made unreviewable by *id.* § 1447(d), and thus may not be reviewed). Second, the *Cohen* doctrine, which interprets finality within the meaning of § 1291, is concerned with the timing of review; it assumes reviewability in principle and focuses on the practical difficulties entailed by postponement of review. The doctrine has not, to our knowledge, been used to review at any time an order of a type that Congress has made unreviewable in principle.

Further, assuming that § 2105 applies to forum-selection motions, if the section were taken literally, it would forbid review of even the granting of a motion to dismiss on forum-selection-clause grounds, for that section does not forbid reversals just of *denials* of motions in abatement; it forbids reversals of any nonjurisdictional "ruling" upon a matter in abatement. We have seen no authority supporting the proposition that such a dismissal, which would, of course, be a final decision in the litigation, is unreviewable.

It appears to us, however, that § 2105 is not to be taken literally. Commentators have called it "one of the most commonly ignored provisions of the Judicial Code," noting that its "most important feature . . . is certainly its disuse." 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3903, at 412, 413 (1976). This seems an accurate observation, for assuming, as did *Coastal Steel*, 709 F.2d at 196, that "matters in abatement" means any (nonjurisdictional) ground for dismissal that would leave the parties free to pursue the suit in another forum, that category would appear to encompass matters such as motions to dismiss on grounds of improper venue or forum non conveniens; yet both grants and denials of those motions are commonly thought to be reviewable on appeal from final judgment. *See, e.g., Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981) (review of grant of forum non conveniens motion); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947) (same); *In re Air Crash Disaster*, 821 F.2d 1147, 1166-68 (5th Cir. 1987) (en banc) (reviewing denial of motion to dismiss for forum non conveniens), *petition for cert. filed* (U.S. Nov. 6, 1987) (No. 87-750); *Carlenstolpe v. Merck & Co.*, 819 F.2d at 35-36; *Denver & Rio Grande Western Railroad Co. v. Brotherhood of Railroad Trainmen*, 387 U.S. 556 (1967) (review of denial of motion to dismiss for improper venue); *Gill v. United States*, 184 F.2d 49, 50-51 (2d Cir. 1950) (same); *Corke v. Sameiet M.S. Song of Norway*, 572 F.2d 77 (2d Cir. 1978) (reviewing denial of motion to transfer venue); *Central Valley Typographical Union, No. 46 v. McClatchy Newspapers*, 762 F.2d 741, 744-46 (9th Cir. 1985) (reviewing both grant by first district court of a motion to transfer venue and denial by transferee district court of a motion to transfer to a third district).

We see no reason why denial of a motion to dismiss on the basis of a contractual forum-selection clause should be any less subject to correction upon appeal from a final judgment than are denials of motions for dismissal on grounds of improper venue or of forum non conveniens. The Supreme Court has held that a forum-selection clause in a commercial agreement "should control absent a strong showing that it should be set aside." *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972); *see Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974). Such a clause thus grants an important right that should be recognized unless the party resisting enforcement shows the clause to be unreasonable. We would think, therefore, that if the district court has erroneously

failed to enforce such a clause, its order may be reversed when the judgment is finally appealed.

Perhaps the most pertinent case decided by our Court is *Avis Rent A Car System, Inc. v. Garage Employees Union, Local 272*, 791 F.2d 22 (2d Cir. 1986), an appeal from a final judgment enforcing an arbitration award. The ground of the appeal was that the district court had refused to enforce a contract provision that required arbitrators to be selected in a certain way from among a certain group. Noting that "analogous contractual forum section clauses are ordinarily binding and enforceable unless the party resisting them . . . shows them to be unreasonable," *id.* at 26, and ruling that no showing of prejudice was required by the party seeking enforcement of the clause, we reversed the judgment enforcing the award entered by the "wrong" arbitrator, and we remanded for entry of an order directing the parties to place their dispute before an arbitrator called for by the contract. Plainly, therefore, in the context of arbitration clauses, which are a type of forum-selection clause, this Court has viewed the refusal to enforce as a matter that is fully reviewable on appeal from the final judgment.

We reject Lauro's suggestion that the right granted in a forum-selection clause, if enforceable, must be vindicated immediately or it is lost. It is a right to have the binding adjudication of claims occur in a certain forum; it is not a right of the same magnitude as a constitutional right to be free from double jeopardy, *see Abney v. United States*, 431 U.S. at 660-62, or the right to be free of any trial whatever, *see Mitchell v. Forsyth*, 472 U.S. at 530 (qualified governmental immunity); *Helstoski v. Meanor*, 442 U.S. at 506-08 (Speech and Debate immunity). The rights to escape any trial or any further trial are rights that would be lost unless vindicated at a pretrial state. In contrast, the right to secure adjudication in a particular forum is not lost simply becuse enforcement is postponed. And, as noted above, the fact that postponing review may entail additional litigation expense has

been explicitly rejected by the Supreme Court as a basis for immediate appeal.

Since we conclude that the district court's denial of Lauro's motion to dismiss on the basis of the forum-selection clause in the passenger tickets will be effectively reviewable on appeal from final judgment, we need not decide whether the first two *Cohen* requirements are met. We conclude that the order at issue here is not appealable under the collateral order doctrine.

Our recent decision in *Karl Koch Erecting Co. v. New York Convention Center Development Corp.*, Nos. 87-7306, *et al.*, slip op. 1431, 1434-36 (2d Cir. Feb. 3, 1988), does not suggest a contrary result. In *Karl Koch*, we held, relying on *Pelleport Industries v. Budco Quality Theatres*, 741 F.2d 273, 278 (9th Cir. 1984), that a district court's enforcement of a contractual forum-selection clause, by remanding a removed action to state court, was appealable under the *Cohen* doctrine. Unlike a refusal to enforce, with which we are presented here, the *Karl Koch* enforcement finally decided the forum-selection issue in a way that made the decision unreviewable on appeal from the final judgment simply because the litigation was no longer proceeding in federal court.

Finally, we reject Lauro's fall-back suggestion that we have jurisdiction of these appeals under 28 U.S.C. § 1292(a)(1) (1982). That section allows appeals of interlocutory orders that grant or deny (or otherwise deal with) injunctions. We do not regard the denial of a motion to dismiss on forum-selection grounds as the equivalent of the denial of a motion for an injunction within the meaning of § 1292(a)(1). Further, even if such a denial were tantamount to the denial of injunctive relief, we would grant the present motion to dismiss, for the Supreme Court "has made it clear that not all denials of injunctive relief are immediately appealable; a partly seeking review also must show that the order will have a " 'serious, perhaps irreparable, consequence," and that the order can be "effectually challenged" *only* by immediate appeal.' " *Stringfellow*, 107 S. Ct. at 1184 (quoting *Carson v. American*

Brands, Inc., 450 U.S. 79, 84 (1981) (quoting *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181 (1955))) (emphasis ours). *See also Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 56 U.S.L.W. 4243 (U.S. Mar. 22, 1988). Since, for the reasons discussed above, we have concluded that meaningful appellate review of the present order will be available after final judgment, assuming that judgment is adverse to Lauro, § 1292(a)(1) provides no basis for immediate appeal of the present order.

CONCLUSION

We have considered all of Lauro's arguments in support of immediate appealability and have found them to be without merit. The appeals are dismissed.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
85 Civ. 9303
October 21, 1987
12:55 p.m.

LEON KLINGHOFFER, ET AL.,

Plaintiffs,

v.

ACHILLE LAURO, ET AL.,

Defendants.

Before:

HON. LOUIS L. STANTON,

District Judge

DECISION

Appearances

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[2] (In open court)

THE COURT: Thank you, gentlemen. And thank you all for excellent briefs on the points involved in this motion.

They have been expressed in writing and orally with clarity and vigor and style, and admirably cover the great variety of aspects involved.

In ruling on the motion in a somewhat laconic fashion, I do not wish to be taken as disregarding any of the areas presented in the papers or orally, but do so because I feel no jurisprudential purpose would be served by expanding my explanation beyond the points which I regard as decisive.

As to jurisdiction over Lauro, this question arises under New York's Long Arm Statute, which requires a showing of a continuous and systematic course of doing business here such as to warrant a finding of Defendant Lauro's presence in this jurisdiction.

Mere solicitation of business through an agent is not enough, although if solicitation is present, in any substantial degree, very little more is necessary to the conclusion that business is being done.

The argument presented on this motion, since it is common ground that solicitation of business was being done, lies in the fact that Lauro's agent for sales [3] and marketing here was Chandris, Inc., which had authority to confirm some cabins on the Achille Lauro, and which had been at least instrumental in part in obtaining for Crown Travel its authority to confirm other space.

In addition, Chandris, Inc., has been responsible for effecting changes in the Achille Lauro's itinerary, and in some degree to the accommodations of the vessel itself. Chandris, Inc., issued tickets for confirmed space, for money which was received and deposited in an account it maintained for Lauro's name, and Chandris, Inc., also handled at least on various occasions the adjustment of passenger complaints.

There are other activities alluded to, including the volume of passengers which was booked and the amount of money involved, but taken as a whole, those of Chandris, Inc.'s, activities are in themselves sufficient to bring Lauro within the jurisdiction of this court, and that ground of the motion is rejected.

I turn now to the ticket condition, as it has been referred to, which is directed to Clause 31, and which raises a question over which the courts have enjoyed 90 years of litigation since The Majestic.

Under the cases, the touchstone is whether the ticket reasonably communicates the importance of its contract provision.

[4] In this case, that is a close question. It is one upon which reasonable jurists, lawyers, and laymen might differ.

On the one hand, arguing for giving effect to Clause 31, there are the facts that the reference on the cover is clear and noticeable, and preceded by the word in solid capital letters, "IMPORTANT."

The sheet containing what is stated to be the terms and conditions of contract of passage falls out of the ticket in a manner that attracts the passenger's attention to it, and, furthermore, as mentioned in at least one of the cases, there is the sensible understanding, that the passenger must be taken to understand, that these intricate provisions in Italian and English were not printed simply for the fun of it, but had legal meaning which affected the contract of passage.

On the other hand, the cover reference is unobtrusive rather than eye-catching. It merely draws attention to the ship owner's terms and conditions, and does not explicitly state that the ticket represents a contract affecting the passenger's substantial rights.

If its tiny type is read, Clause 31 carries an importance beyond the importance of clauses dealing with short statutes of limitation.

While a statute of limitations clause can be [5] examined after the accident when the importance of the contract as a whole is apparent to all, the effect of Clause 31 is immediately and irrevocably to divest the passenger's right to sue anywhere except before the judicial authority in Naples.

Yet, the contract is at least indirectly ambiguous on that point. For unlike the time limitation Clause 27, Clause 31 is not included in the list of clauses of which the passenger "specifically approves."

Finally, there is a place for the passenger's signature at the bottom of the contract, a provision which as far as appears has been entirely disregarded by both parties to the contract.

On the question, then, as a whole, I find that the ticket does not give fair warning to the American citizen passenger that he or she is renouncing and waiving his or her opportunity to sue in a domestic forum over a contract made and delivered in the United States.

That brings me to the final ground for the motion, the *forum non conveniens* argument, which is raised in a case in which there are in this forum Chandris, Inc., every plaintiff, of whom all are United States citizens, and Crown Travel, and all the initial parties to the suit. The contract was made here and delivered here.

As against that arguing for transfer there are [6] three serious considerations offered. The first is the location of Lauro's crew witnesses. These matters always involve balancing. On balancing their travel here it would not appear to me to impose such a burden as to upset the plaintiff's choice of forum.

The other body of witnesses located in Italy, who have been referred to as the terrorists, do not appear to me to be so important to the issues in this case as to justify its transfer to Naples.

Finally, there is the question of the application of Italian law, and as to the ultimate application of Italian law in this action, I make no ruling at this time.

What issues Italian law might govern is a point as yet somewhat unclear, nor does there appear at this point any particular difficulty in ascertaining or applying Italian law to the extent it may properly be required, and, therefore, I do not find that that factor either separately or in concert with the others justifies transfer under *forum non conveniens*.

Accordingly, the motion is denied, and will be so endorsed for the reasons stated. Thank you very much.